BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JUAN VALENCIA	)	
Claimant	)	
VS.	)	
	)	Docket No. 247,035
INTERSTATE BRANDS CORPORATION	)	
Respondent	)	
AND	)	
	)	
KEMPER INSURANCE	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appeal from a preliminary hearing Order for Medical Treatment entered by Administrative Law Judge Brad E. Avery on October 21, 1999.

ISSUES

This case involves a claim for bilateral upper extremity injuries that are alleged to have occurred "on or about October 21, 1998." At the October 15, 1999 preliminary hearing claimant was seeking payment for services provided by Jane K. Drazek, M.D., as unauthorized medical, authorized medical treatment and a change of treating physician. Respondent admitted claimant met with personal injury by accident on the date alleged and notice, but denied the accidental injury arose out of the employment.

The Administrative Law Judge found claimant suffered personal injury by accident that arose out of and in the course of his employment with respondent. Judge Avery authorized Dr. Ketchum to treat both the right and the left upper extremities.

On appeal, respondent describes the issues as:

1. Whether claimant suffered an injury arising out of and in the course of employment with respondent.

2. Whether claimant gave timely notice of his alleged left upper extremity injury.

FINDINGS OF FACT

Claimant is a Spanish speaking individual and the translation of his preliminary hearing testimony is terse. The grammar and vocabulary used are often inappropriate and sometimes make the answers difficult to understand. It is not known whether the translation reflects a lack of education of the witness or if it is a product of the translation process, or both.

Claimant began working for respondent on September 5, 1998. His job duties involved lifting empty pans, sized two foot by three foot, onto a "chain" or conveyor belt. The weight of these pans is not given. Claimant described his job duties as lifting the pan, turning it over and placing it on a "chain" that was at chest level. This involved bending at the waist, bending the wrists and gripping with both hands. This procedure was repeated over 1,000 times an hour.

Claimant did not experience any pain to any part of his body until on or about October 1, 1998. Claimant describes a specific onset of pain in his right wrist and forearm. He also described having numbness in two fingers of his right hand, pain up to and including the elbow and swelling in the wrist.

Claimant reported this injury to his supervisor. He was given medical treatment and transferred to the shipping department. Claimant testified that while he was working in the shipping department he used his left hand more because of the pain in his right hand. Claimant is right hand dominant. Eventually he began to experience symptoms in his left upper extremity. This included pain and numbness in the left hand and fingers and pain radiating up to and including the left elbow. Claimant last worked in March or April of 1999.

Claimant was initially seen by Dr. Hutchison who referred him to orthopedic surgeon Brad W. Storm, M.D., a hand specialist. Dr. Storm first saw claimant on January 21, 1999. At that time claimant's complaints were only in his right upper extremity. Dr. Storm diagnosed stage III Kienböck's disease which if work related, would result in a one-handed duty work restriction. Dr. Storm concluded claimant's condition was not work related and therefore claimant's impairment was not due to work.

> To begin, this disease clearly pre-dated his commencement of employment at Interstate Brands and I can say this well beyond reasonable medical certainty. This disease process would be at this stage regardless of his employment, and in this sense, I cannot truthfully consider this a work-related injury. His activities may have increased his symptoms but the basic disease process was present well before his employment at Interstate Brands.

At the request of his attorney, claimant was examined by Dr. Drazek of the Via Christi Rehabilitation Center in Wichita, Kansas, on May 14, 1999. At that time claimant

was experiencing symptoms in both his right and left upper extremities. The left upper extremity complaints began approximately one month before the date of Dr. Drazek's examination. Her report relates claimant's symptoms and describes her clinical findings on examination, but does not give a diagnosis other than to repeat the opinion given by Dr. Storm of stage III Kienböck's disease in the right wrist. She agrees "this is most likely secondary to a vascular necrosis and appears to have been long standing." Her treatment recommendation is to consider surgical intervention and recommends "treatment be provided by the hand surgeon", presumably meaning Dr. Storm. Dr. Drazek does not give a causation opinion.

CONCLUSIONS OF LAW

In general, the Kansas Workers Compensation Act requires employers to compensate employees for personal injuries or aggravations of preexisting injuries incurred through accidents arising out of and in the course of employment. K.S.A. 1998 Supp. 44-501(a); Kindel v. Ferco Rental, Inc., 258 Kan. 272, Syl. ¶ 2, 899 P.2d 1058 (1995); Baxter v. L.T. Walls Constr. Co., 241 Kan. 588, 738 P.2d 445 (1987). The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact. Harris v. Bethany Medical Center, 21 Kan. App. 2d 804, 909 P.2d 657 (1995). The question of whether an aggravation of a preexisting condition is compensable under workers compensation turns on whether claimant's work activity aggravated, accelerated or intensified the disease or affliction. Boutwell v. Domino's Pizza, 25 Kan. App. 2d 100, 121, 959 P.2d 469, *rev. denied 265* Kan. ___ (1998).

Claimant described the onset of symptoms in both his right and left upper extremities as occurring at work. Clearly, claimant's job duties involved repetitive and hand intensive work. The only testimony that refutes claimant's assertion that his injuries are work related is the opinion of Dr. Storm. His opinion in this regard relates specifically to his diagnosis of Kienböck's disease in the right wrist. It is not clear whether this Kienböck's disease accounts for all of claimant's right upper extremity symptoms. But it obviously does not account for claimant's left upper extremity symptoms. The Appeals Board finds that claimant's left upper extremity condition is the result of overuse caused by performing his work activities in a manner to protect his painful right upper extremity. The left upper extremity condition, therefore, arose out of and in the course of his employment with respondent and claimant is entitled to treatment for this condition.

Whether claimant has sustained injury to his right upper extremity separate and apart from the Kienböck's disease is not clear. What is clear is that the origin of the Kienböck's disease is not work related and Dr. Storm, whose opinion the Appeals Board finds to be the most credible, does not consider the claimant's work activities to have aggravated, accelerated or intensified the Kienböck's disease. That condition, therefore, is not compensable. *See*, Boeckmann v. Goodyear Tire & Rubber Co., 210 Kan. 733, 504 P.2d 625 (1972).

The Administrative Law Judge found "claimant's work activities accelerated his right upper extremity symptoms. Dr. Ketchum is to evaluate what, if any, treatment is required in his left upper extremity." "Medical treatment is granted and ordered paid on claimant's behalf by respondent and insurance carrier with Dr. Ketchum until further order."

The Appeals Board concludes that any treatment Dr. Ketchum provides for the right upper extremity should not include treatment for the Kienböck's disease. Dr. Ketchum's evaluation and treatment for the left upper extremity is approved.

Respondent argues for the first time on appeal that it did not receive timely notice of the left upper extremity injury. *See*, K.S.A. 44-520. But at page 5 of the Preliminary Hearing Transcript, Judge Avery announced, inter alia, that respondent admits notice. Date of accident was also not an issue at the preliminary hearing nor was injury by accident. Respondent concurred with the stipulations and issues as announced by the ALJ. The stipulations were not limited to the right upper extremity only but were "for an accident on or about 10/1/98." The form K-WC E-3 Application for Preliminary Hearing alleged an accident "on or about October 1, 1998" as did the form K-WC E-1 Application for Hearing which also specifically alleged claimant's injuries were to the "bilateral hands, wrists, elbow and all areas affected by injury." Respondent was, therefore, on notice before the preliminary hearing that claimant was claiming injury to both upper extremities. Claimant's notice of intent letter to respondent was premised upon that claim.

Respondent stipulated to notice at the preliminary hearing. Respondent can withdraw that stipulation at regular hearing or at a subsequent preliminary hearing. But respondent cannot raise a notice issue for the first time on appeal.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the October 21, 1999 Order for Medical Treatment entered by Administrative Law Judge Brad E. Avery should be, and is hereby, modified to exempt respondent from paying for treatment of claimant's Kienböck's disease but is otherwise affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 2000.

BOARD MEMBER

c: Diane F. Barger, Wichita, KS
P. Kelly Donley, Wichita, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director